

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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A/S

77-2130

**United States Court of Appeals
For the Second Circuit**

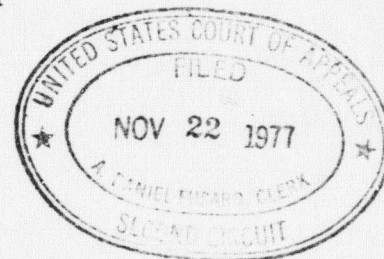
ROBERT BROWN,
Petitioner-Appellant,

-against-

MELVYN TANENBAUM, a Judge of the County Court of the
State of New York, Suffolk County, HENRY O'BRIEN,
District Attorney of Suffolk County, BENJAMIN WARD,
Commissioner of Corrections of the State of New York, and the
SHERIFF OF THE COUNTY OF SUFFOLK,
Respondents-Appellees.

Joint Appendix

RHODES, BAKER & FISHER
Counsel for Petitioner-Appellant
16 Court Street
Suite 1210
Brooklyn, N.Y. 11241



PAGINATION AS IN ORIGINAL COPY

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BROWN VS TANNENBAUM

DATE	NO.	PROCEEDINGS	
5-25-77		Petition for a writ of habeas corpus filed.	(1)
5-26-77		By PRATT, J.- Order to show cause dtd. 5-25-77 ret. 6-9-77 why petition should not be granted filed w/o proof of service filed.	(2)
6-3-77		Respondents memo of law regarding petitioner's habeas corpus filed.	(3)
6-9-77		Memo of law for O'Brien in opposition to writ filed.	(4)
6-9-77		Before PRATT, J.- Case called for OSC. Motion argued. Execution of ser enjoined pending decision of petition, - decision reserved	
10-19-77		By PRATT, J.- Memo and order dismissing the petition for a writ of habe corpus and vacating that the stay of execution of sentence previously ordered by the court 10 days after the filed the memo and order and issuing a certificate of probable cause filed. copies mailed.	(5)
10-19-77		Judge at that the petitioner recover from the respondents nothing and that the petition is dismissed and vacating 10 days after the fili of the aforesaid memo and order the stay of execution of petitioner's sentence previously ordered by the court filed.	(6)
10/28/77		Reply brief for petitioner, filed.jm	(7)
10/28/77		Letter of M.M. Baker to Pratt, J.- dtd 6/16/77 filed.jm	(8)
10/28/77		Letter of H. F. O'Brien to Pratt, J.- dtd 6/14/77 filed.jm	(9)
10-31-77		Notice of appeal by petitioner filed. copies mailed.	(10)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ROBERT BROWN,

Petitioner,

INDEX NO.

-against-

MELVYN TANENBAUM, a Judge of the
County Court of the State of New
York, Suffolk County, HENRY O'BRIEN,
District Attorney of Suffolk County,
BENJAMIN WARD, Commissioner of
Corrections of the State of New York,
and the SHERIFF OF THE COUNTY OF
SUFFOLK,

Respondents.

ORDER TO SHOW CAUSE

UPON THE VERIFIED PETITION OF ROBERT BROWN, upon the exhib-
its appended thereto, and upon all papers filed and proceedings
had herein, and sufficient cause appearing therefor,

LET the respondents and each of them show cause before
this Court, at a stated term thereof, at the United States Court-
house located at ~~225 Cadman Plaza East, Brooklyn~~ ^{900 Ellison Avenue, Westbury}, New York on the
9th day of June, 1977 at ~~9:30~~ ^{3:30} o'clock in the ~~forenoon~~ ^{after} noon of that
day or as soon thereafter as counsel can be heard,

WHY a writ of habeas corpus should not issue discharging the petitioner from all custodial constraints heretofore imposed upon him and, further,

WHY an order should not issue restraining the respondents and each of them from executing the sentence imposed upon the petitioner pursuant to a judgment of conviction entered under Suffolk County Indictment No. 555/1972, and it is further,

ORDERED that, pending the hearing and determination of the petition herein, the respondents and each of them are restrained, pursuant to 28 USC Section 2251, from executing the aforesaid sentence, and the petitioner shall continue to be released in his own recognizance, and it is further,

ORDERED that service of a copy of this Order to Show Cause upon the ~~respondents~~ *Attorney General and Suffolk County District Attorney* on or before 5 o'clock, p.m., on the 26th day of May, 1977, shall be good and sufficient service thereof.

Dated: *Westbury*
~~Brooklyn~~, New York
May 25, 1977
6:05 P.M.

ENTER

S/ GEORGE C. PRATT
U.S.D.J.

PETITION FOR WRIT OF HABEAS CORPUS

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

ROBERT BROWN,

Petitioner,

INDEX NO.

-against-

MELVYN TANENBAUM, a Judge of the
County Court of the State of New
York, Suffolk County, HENRY O'BRIEN,
District Attorney of Suffolk County,
BENJAMIN WARD, Commissioner of
Corrections of the State of New York,
and the SHERIFF OF THE COUNTY OF
SUFFOLK,

Respondents.

PETITION FOR A WRIT
OF HABEAS CORPUS

TO THE HONORABLE GEORGE C. PRATT, JUDGE OF THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK,

The petition of ROBERT BROWN respectfully alleges

1. That the petitioner is a citizen of the United States
of America, and is a resident of the County of Nassau, State of
New York, in the Eastern District of New York.

2. That the petitioner, being unlawfully restrained of his
liberty by the respondents, hereby petitions the Court for a

writ of habeas corpus upon grounds which, by law and by express reservation of the County Court of Suffolk County, the court of conviction herein, survive the petitioner's plea of guilty and are preserved for this Court's review.

3. That the sole claim and authority by virtue of which the petitioner is restrained of his liberty is a judgment of the County Court of the State of New York, Suffolk County, respondent MELVYN TANENBAUM presiding, entered April 2, 1976, which, upon petitioner's plea of guilty, convicted him of the crimes of Obscenity in the First Degree and Obscenity in the Second Degree (Sections 235.06 & 235.05 of the Penal Law of New York) and sentenced him to serve concurrent terms of imprisonment of three years and of sixty days: respectively (Exhibit A).

4. That, by reason of his having been released on his own recognizance pending the outcome of appellate review of the aforesaid judgment, the petitioner is not presently incarcerated; however, upon information and belief, the respondent HENRY O'BRIEN had demanded that the petitioner surrender on May 27, 1977.

5. That the aforesaid judgment and the resulting order of commitment are void and without authority of law, and the pending imprisonment of the petitioner pursuant thereto would constitute a denial of rights secured to him by the First and Fourteenth Amendments to the Constitution of the United

States as hereinafter shown.

6. That on or about April 28, 1972, an indictment was returned by a Suffolk County grand jury charging the petitioner and others, in 207 counts, with the crimes of Conspiracy in the Third and Fourth Degrees, and Obscenity in the First and Second Degrees.

7. That the crimes charged were alleged to have been committed between January, 1971, and April, 1972.

8. That when proceedings began on the aforesaid indictment in the County Court of Suffolk County, the petitioner by his counsel, interposed numerous and varied motions attacking the indictment and the process by which it was returned, and requesting pre-trial discovery; each motion was summarily denied.

9. That among the aforesaid motions was an omnibus motion seeking, inter alia, the inspection of the grand jury minutes and the dismissal of the indictment on the ground that the evidence before the grand jury was not legally sufficient to sustain it.

10. That, in its memorandum decision summarily denying the aforesaid motion, the County Court (per Pierre G. Lundberg, J.) wrote, "The titles included in this multi-count indictment are the same titles included in the search warrant issued by this

A 006

Court on March 22, 1972 (Hon. F.L.Gates). After scrutinizing each of said publications, Judge Gates made a preliminary determination that each of said publications is obscene before issuing the warrant....This resolves in my mind the question - - - whether the titles included in counts 2-207, inclusive, are obscene pursuant to Penal Law Section 235.00. The Grand Jury may find on the basis of the material itself that it contains all the statutory elements of being obscene including but not limited to the lack of redeeming social value." (Exhibit B)

11. That, thereafter, the petitioner moved again to dismiss the indictment on the grounds, inter alia, that "[t]he material is not obscene as a matter of law" and that "Sections 235.05 and 235.06 [of the Penal Law of New York] are unconstitutional" (Exhibit C)

12. That the County Court, (per Lundberg, J.) summarily denied the aforesaid motion, noting in its memorandum decision that "[i]n support of [the previously made] omnibus motion, the voluminous submissions by the defendants discussed a number of points which are now included as grounds for this present motion..." (Exhibit D)

13. That, subsequently, the petitioner moved to reargue his motion to inspect the minutes of the grand jury and to dismiss

A 007

the indictment for legal insufficiency. (Exhibit E)

14. That in its decision denying the aforesaid motion to reargue, the County Court, (per Lundberg, J.) wrote, "Neither the Criminal Procedure Law nor Matter of Miranda v. Isseks, 41 App. Div. 2d 176, prevent [sic] the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. and the prior judicial determination by Judge Gates." (emphasis added)(Exhibit F)

15. That, finally, after intensive consultation with his counsel regarding the course and effect of proceedings previously had, after giving careful consideration to the interests and fate of his son, the co-defendant Barry Brown, and facing the severe emotional strain and oppressive legal cost of defending against a massive 207 count indictment, the petitioner entered pleas of guilty to two counts - one charging a felony, and one a misdemeanor - in full satisfaction of the indictment.

16. That, throughout the allocution upon which the court's acceptance of the plea was predicated, the petitioner repeatedly asserted that at the time of the alleged offenses it was his firm belief that under the then prevailing law the materials in question were not obscene; he insisted that, had he believed or

known otherwise, he would not have sold them. (Exhibit G)

17. That the petitioner continues to believe, and was so advised by legal counsel when the materials were sold, that, to the extent that the standards prescribed by the New York obscenity statutes were ascertainable, the materials in question were not obscene and were protected by the First Amendment to the Constitution of the United States.

18. That, following his conviction and the imposition of sentence, the petitioner appealed therefrom to the Appellate Division of the Supreme Court of New York, Second Judicial Department, which unanimously affirmed the judgment without opinion (Exhibit H)

19. That, thereafter, permission to appeal to the Court of Appeals of the State of New York was denied by Chief Judge Charles D. Breitell. (Exhibit I)

20. That, consequently, the petitioner has exhausted all remedies available to him in the courts of New York, and can free himself from the illegal restraints imposed upon him only through recourse to the Federal Courts.

21. That the petitioner respectfully submits that he is

deserving of habeas corpus relief because the constraints in which he is held are illegal and unconstitutional in that,

(a) the statutes under which he stands convicted, as read and interpreted at the time of the commission of the alleged offenses, were vague, indefinite and overbroad and therefore were violative of the First and Fourteenth Amendments to the Constitution of the United States, and,

(b) as a matter of law, the materials upon which the conviction was based were protected under the said First Amendment, and, hence, a conviction for their sale and promotion is violative of the said Fourteenth Amendment.

22. That in support of this application, the petitioner submits herewith, and incorporates herein by reference, a brief, more fully discussing the issues of law raised herein, and an appendix, containing relevant documentary exhibits.

23. That the petitioner respectfully requests that the said brief and appendix be considered herewith.

24. That no previous application has been made for the relief herein sought.

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WHEREFORE, the petitioner respectfully requests that a writ of habeas corpus be issued discharging the petitioner from all custodial constraints heretofore imposed upon him, and, further, that an order be issued restraining the respondents from executing the sentence imposed upon the petitioner pursuant to the judgment of conviction entered under Suffolk County Indictment No. 555/1972. The petitioner further requests that, pending the hearing and determination of the petition herein, an order be issued restraining the respondents from executing the aforesaid sentence, and permitting the petitioner to remain released in his own recognizance.

S/ ROBERT BROWN
PETITIONER

STATE OF NEW YORK)
)ss.:
COUNTY OF *KINGS*)

ROBERT BROWN, being duly sworn, deposes and says:

Deponent is the petitioner in the above action. Deponent has read the foregoing petition and knows the contents thereof, and the same is true to deponent's own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

S/ ROBERT BROWN
ROBERT BROWN

Sworn to before me this
day of May, 1977.

A 611

S/
Notary Public

JUDGMENT OF CONVICTION (BROWN)

COMMITMENT TO

THE STATE DEPARTMENT OF CORRECTION

File No. 18949-D

Clerk: Parks
Steno: Lasky

PRESENT:

HON. MELVYN TANENBAUM
County Judge

Indictment No. 555-72

THE PEOPLE OF
THE STATE OF NEW YORK

against

ROBERT BROWN

At a term of the County Court of
..... Suffolk County, held in and for
the County of Suffolk in the
Court House in Riverhead New York,
on the 2nd day of April in
the year of our Lord one thousand nine hundred and
..... seventy-sixIndicted for Conspiracy 2nd Degree (1st Ct);
Conspiracy 4th Degree (2nd Ct); Obscenity
1st Degree (Cts 3 through 125); Obscenity
2nd Degree (Cts 126 through 207);and convicted of the crime of Obscenity 1st Degree
as charged in 117th Court and Obscenity
2nd Degree as to 136th Court as set out
in and about January 1971 to 1E and
Crime committed about March 1972. XXXXThe defendant having been found guilty by plea ~~XXXXXX~~ of a felony, to wit:
Obscenity 1st DegreeWHEREUPON, it is ORDERED and ADJUDGED by the Court, that the said
ROBERT BROWNObscenity 1st Degree (117th Ct);
for the felony aforesaid whereof he is convicted be sentenced to an INDETERMINATE sentence of im-
prisonment which shall have a maximum term of THREE (3) years ~~XXXXXX~~~~XXXXXX~~ It isFURTHER ORDERED by the Court that the said defendant be committed to the custody of the State
Department of Correction, and he shall be delivered to the OSSINING Correctional Facility
at OSSINING New York there to be dealt with in accordance with the laws pertaining
to his sentence.

See rider attached

A TRUE EXTRACT FROM THE MINUTES:

Lester H. Callahan
SignatureCLERK
Title*N.B. Minimum period mandatory for class "A" felony
(Optional for class B C D felony)

A 012

14-150V

JUDGMENT OF CONVICTION (BROWN)

Clerk: Parks✓
Steno: Lasky

File No. 18949-D
Indt. No. 555-72

People Vs. ROBERT BROWN

It is further ORDERED and ADJUDGED by the Court that the said ROBERT BROWN for the Obscenity 2nd Degree (136th Ct); whereof he is convicted, be sentenced to a definite sentence of imprisonment for a term of SIXTY (60) DAYS and that he be committed to the County Jail, Suffolk County, there to be dealt with in accordance with the laws pertaining to his sentence.

Said sentences to run concurrently.

Upon application of Defense Counsel, execution of sentence stayed until May 21, 1976.

Defense Counsel advised the defendant of his right to appeal within 30 days.

Defendant released in his own recognizance as Sheriff.

A TRUE EXTRACT OF THE MINUTES

[Signature]
Clerk

jb

MEMORANDUM

COUNTY COURT, SUFFOLK COUNTY

Indictment No. 535/72

PEOPLE OF THE STATE OF NEW
YORK,

BY LUNDBERG, J.

DATED March 8 1973

VS
OVERSTOCK BOOK CO., INC.
TIMELY BOOKS a/k/a BEAUT
BOOKS, BANO PANAS a/k/a
BARRY BROWN and ROBERT BROWN,
Defendants.

HON. GEORGE J. ASPLAND
District Attorney of Suffolk County
Griffing Avenue
Riverhead, New York 11901

SARISOHN, THIERMAN & SARISOHN, ESQS.
Attorneys for Defendants - OVERSTOCK
BOOK CO. INC., etc. and ROBERT BROWN
67 Harned Road
Commack, New York

MORRIS J. LARA, ESQ.
Attorney for Defendant-BANO PANAS
225 Broadway
New York, New York 10007

JOEL HIRSCHORN, ESQ.
Attorney for Defendant-BARRY BROWN
1040 City National Bank Building
Miami, Florida 33130

This is an omnibus motion by all defendants for the following relief:

1. Inspection of Grand Jury minutes;
2. Dismissal of indictment;
3. Bill of particulars;
4. Discovery and inspection.

The affirmation dated November 29, 1972, in support of this omnibus motion when read together with the memorandum submitted by defense counsel and the affirmation dated February 23, 1973, places defendants' motions 1 and 2 within the purview of Criminal Procedure Law §210.30, viz., for inspection of grand jury minutes by this court and dismissal of this indictment.

There is no provision to make available the Grand Jury minutes to defendants prior to trial and, accordingly, defendants' motion #1 is denied. Proskin v. County Court of Albany County, 30 N.Y.2d 15,20.

Based on the affirmation in support of this motion, all other papers submitted, including previous proceedings, this Court determines there is not reasonable cause to believe that the evidence before the Grand Jury may have been legally insufficient to support each count of this indictment and, accordingly, defendants' motion for this Court's inspection of the Grand Jury minutes and dismissal of this indictment is denied.

MEMORANDUM DECISION, MARCH 1973,
DENYING OMNIBUS MOTION (LUNDBERG, J.)
MEMORANDUM

COUNTY COURT, SUFFOLK COUNTY

Indictment No. 555/72

THE PEOPLE OF THE STATE OF
NEW YORK

BY LUNDBERG, J.

DATED March 8 1973

VS.
OVERSTOCK BOOK CO. INC. a/k/a
TIMELY BOOKS a/k/a BEAUTIFUL
BOOKS, HANO PANAS a/k/a GUS,
BARRY BROWN and ROBERT BROWN
Defendants.

- 2 -

The titles included in this multi-count indictment are the same titles included in the search warrant issued by this Court on March 22, 1972 (Hon. F.L. Gates). After scrutinizing each of said publications, Judge Gates made a preliminary determination that each of said publications is obscene before issuing the warrant. See memorandum decision dated September 20, 1972 (Hon. F.L. Gates). This resolves in my mind the question -- whether the titles included in counts 2-207, inclusive, are obscene pursuant to Penal Law §235.00. The Grand Jury may find on the basis of the material itself that it contains all the statutory elements of being obscene including but not limited to the lack of redeeming social value. Cf. People v. Tanga, N.Y.L.J. 12/21/72, p.2, col.1; People v. Kirkpatrick, 64 Misc. 2d 1056, 1080, aff'd 69 Misc. 2d 212.

Defense counsel's submission contains nothing more than his conclusions and speculations and is insufficient to warrant even an in camera inspection by this Court, People v. Howell, 3 A.D. 2d 153, aff'd 3 N.Y.2d 872.

Bill of particulars, items a - i, inclusive; discovery and inspection, items a - g including all subdivisions.

The defendants seek substantially the complete People's case to be presented at the trial of this indictment. The affirmation in support of these motions attempts to set forth the law in the area of obscenity. Particular reference is made to item 10(f) wherein the defendants, on the basis of Brady v. Maryland, 375 U.S. 83, seek discovery and inspection of all evidence favorable to the defendants and material to the issue of guilt or innocence or to punishment in this case. This obligation is imposed on the People at all times and is explicitly acknowledged by them. Under the mandate of Brady v. Maryland, supra, the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution and no order is required to force compliance by the District Attorney. A perusal of police reports and the files of the District Attorney is an unwarranted extension of Brady v. Maryland.

Defendants' motions are denied. Submit order.

4 15 PIERRE G. LUNDBERG

C. J.

NOTICE OF MOTION TO DISMISS INDICTMENT
(UNDATED)

COUNTY COURT
COUNTY OF SUFFOLK

THE PEOPLE OF THE STATE OF NEW YORK :

-against- :

OVERSTOCK BOOK COMPANY, INC., a/k/a
TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS, :
BANO PANAS, a/k/a GUS, BARRY BROWN :
and ROBERT BROWN, :

Defendants :

NOTICE OF MOTION

Indictment No. 555/72

Motion By:

All Defendants.

Date, Time and
Place of Hearing:

April 30, 1973, at 9:30 o'clock in the
forenoon of that date at the Courthouse
located at Griffing Avenue, Riverhead,
New York.

Supporting Papers:

Affirmation of FLOYD SARISOHN, dated
April 6, 1973, and Memorandum of Law, and
the Indictment, all previous pleadings
and proceedings held herein.

Relief Requested:

Dismissal of Indictment and such other,
further and different relief as to the
Court might seem just and proper in the
premises.

Grounds:

1. No judicial determination was had as to the obscenity vel non of the material prior to the issuance of arrest warrant and/or Grand Jury presentation.
2. The material is not obscene as a matter of law.
3. Sections 235.05 and 235.06 are unconstitutional.
4. The Indictment is insufficient as a matter of law.
5. The Indictment fails to show which Defendants are involved in which counts.
6. The counts of the Indictment are vague, ambiguous, duplicitous and subject Defendants to double jeopardy.
7. The Indictment fails to allege facts as would constitute a crime.

NOTICE OF MOTION TO DISMISS INDICTMENT
(UNDATED)

8. The Indictment fails to conform to the requirements of the CPL.
9. The Indictment states conclusions rather than facts.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are to be served within five (5) days prior to the return date hereof.

Yours, etc.

FLOYD SARISOHN
Attorney for Defendants OVERSTOCK
BOOK COMPANY, INC., etc. and
ROBERT BROWN
1020 East Jericho Turnpike
P. O. BOX 292
Commack, New York 11725

JOEL HIRSCHHORN
Attorney for Defendant BARRY BROWN
1040 City National Bank Building
25 West Flagler Street
Miami, Florida 33180

MORRIS J. EZRA
Attorney for Defendant BANO PANAS
225 Broadway
New York, New York 10007

TO: HONORABLE GEORGE J. ASPLAND
District Attorney
County of Suffolk, New York
Griffing Avenue
Riverhead, New York 11901

MEMORANDUM DECISION DATED MAY 8, 1973
DENYING MOTION TO DISMISS INDICTMENT.
LUNDBERG, J.)

MEMORANDUM

COUNTY COURT, SUFFOLK COUNTY

Indictment No. 555-72 (Ex Novo)

THE PEOPLE OF THE STATE OF
NEW YORK,

BY LUNDBERG, J.

VS
OVERSTOCK BOOK COMPANY, INC.,
a/k/a TIMELY BOOKS a/k/a BEAUTI-
FUL BOOKS, LINO PANAS a/k/a GUY,
BARRY BROWN and ROBERT BROWN.

DATED May 8 19 73

HON. GEORGE J. ANGLIM
District Attorney of Suffolk County
Griffing Avenue
Riverhead, New York 11931

FLOYD SARISON, ESQ.
Attorney for Defendants-OVERSTOCK
BOOK COMPANY, INC., etc., and
ROBERT BROWN
1020 L. Jericho Turnpike - PO Box 292
Commack, New York, 11725

JOEL HIRSCHORN, ESQ.
Attorney for Defendant-BARRY BROWN
1040 City National Bank Building
23 West Flagler Street
Miami, Florida 33130

MORRIS J. LIMA, ESQ.
Attorney for Defendant-LINO PANAS
225 Broadway
New York, New York 10007

The omnibus motion made by all defendants dated November 29, 1972, included therein a motion to dismiss all counts of this indictment pursuant to C.P.L. §210.20(1)(L). Based on a memorandum decision of this Court dated March 8, 1973, the order of this Court granted April 25, 1973, denied that omnibus motion. In support of that omnibus motion, the voluminous submissions by the defendants discussed a number of points which are now included as grounds for this present motion submitted April 30, 1973.

The relief requested in the present motion is dismissal of this indictment pursuant to CPL §210.20(1)(a)(c) and (d).

This multi-count indictment was returned by the Grand Jury April 28, 1972. The defendants, OVERSTOCK BOOK COMPANY, INC., BARRY BROWN and ROBERT BROWN, were arraigned on this indictment May 10, 1972. The defendant, LINO PANAS, was arraigned June 22, 1972.

Defendants' present motion is summarily denied, CPL §210.20(3). See also CPL §210.20(2) effective April 28, 1972. The sixteen page affirmation in support of this motion, annexed Exhibit 1, an eleven page memorandum entitled "A Judicially Supervised Hearing Must Precede the Purchase, Arrest and/or Seizure of Press Materials", and annexed Exhibit 2, a sixty-three page "Schedule of Cases Holding Various Materials Not to be Obscene in a Constitutional Sense", fail to demonstrate any basis for this Court to entertain this motion as a matter of discretion.

This Court would further note that provision is made in CPL §230.40(3)(a), 300.40(4) and 300.40(6)(b) with respect to submission of selective counts to a petit jury. Submit order.

PIERRE G. LUNDBERG

NOTICE OF MOTION TO REARGUE, DATED MAY
2, 1973

COUNTY COURT : COUNTY OF SUFFOLK

PEOPLE OF THE STATE OF NEW YORK,

- against -

OVERSTOCK BOOK CO., INC., a/k/a
TIMELY books a/k/a BEAUTIFUL BOOKS,
BANO PANAS a/k/a GUS, BARRY BROWN
and ROBERT BROWN,

Defendants.

SIR:

PLEASE TAKE NOTICE that upon the annexed affirm-
ation of MORRIS J. EZRA, attorney for the defendant BANO PANAS,
a/k/a GUS, dated the 2nd day of May, 1973, and the Indictment
and upon all of the papers, pleadings and proceedings hereto-
fore had herein, the undersigned will move this Court, at a
Criminal Term thereof, at the Courthouse located at Griffing
Avenue, Riverhead, New York, on the 2nd day of May, 1973, at 9:30
o'clock in the forenoon of that day or as soon thereafter as
Counsel can be heard, for granting reargument on defendants'
motion to inspect the Grand Jury Minutes and dismissing People's
complaint by reason of insufficient evidence presented to the
Grand Jury, and upon such reargument, vacating and setting aside
the denial of the original motion and granting same in all re-
spects, and for such other, further and different relief as may
be just and proper.

Dated, New York, N.Y.
May 2, 1973.

Yours, etc.,

FLOYD SARISOHN
MORRIS J. EZRA
JOEL HIRSCHIORN
Attorneys for Defendants

A 019

TO: GEORGE J. ASPLAND
District Attorney
Suffolk County, N.Y.

AFFIRMATION OF MORRIS EZRA, DATED MAY
21, 1973, IN SUPPORT OF MOTION TO
ARGUE
COUNTY COURT, COUNTY OF SUFFOLK
----- X

PEOPLE OF THE STATE OF NEW YORK,

- against -

OVERSTOCK BOOK CO., INC., a/k/a
TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS,
BANO PANAS a/k/a GUS, BARRY BROWN
and ROBERT BROWN,

Defendants.

----- X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

MORRIS J. EZRA, an attorney duly admitted to
practice in the Courts of the State of New York, affirms under
penalty of perjury:

I am the attorney for the defendant BANO PANAS
a/k/a GUS.

That heretofore and on April 23, 1973, HON.
PIERRE G. LUNDBERG, a Judge of this Court, made and entered a
decision and order denying defendants' motion to inspect the
Grand Jury Minutes and dismissal of the indictment on the grounds
of insufficiency.

Undoubtedly in denying the aforesaid motion,
Judge Lundberg relied on the cases of People v. Howell, 3 NY 2d
672 and People v. Nitzberg 289 NY 523.

At the time of the rendering of the decision
aforesaid, Judge Lundberg was not aware of the decision in the
case of MIRANDA v. ISSEKS, appearing on the front page of the Law
Journal on April 12, 1973 which held that:

"However, since a defendant, by virtue of
that statute (CPL 190.65, subd.1), can no
longer attack a conviction on the ground
that in fact the proof before the Grand
Jury is legally insufficient to make out a
crime, as is the petitioner's claim here,
we believe it to be the better practice
for judges at nisi prius to be most liberal
in granting motions to inspect grand jury

CONFIRMATION OF MORRIS EZRA, DATED MAY
21, 1973, IN SUPPORT OF MOTION TO
REARGUE

camera for the purpose of determining their sufficiency".

The Appellate Division in the MIRANDA case (supra) went on further to state:

"In People v. Howell (3 NY 2d 672, 675) the Court clearly pointed out the differences in the treatment to be accorded a motion to dismiss an indictment on the ground of insufficiency vis-a-vis a motion to inspect when it said:

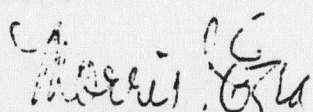
'A motion to dismiss an indictment for insufficiency of the evidence before the Grand Jury.... is granted only upon a clear showing to that effect, in view of the presumption that an indictment is based on legal and sufficient evidence That degree of proof.... is not necessary on a motion for inspection of the Grand Jury minutes in order to lay a foundation for dismissal of an indictment on this ground.

In the instant case, it is the contention of the defendants that the indictment is invalid since it was founded on legally insufficient evidence. Since the law clearly states that the denial of a motion to inspect the Grand Jury Minutes and for dismissal of the indictment is not reviewable on appeal no matter how legally deficient the proof before the Grand Jury, if the prosecutor on the trial has established his case, it is incumbent on the court to inspect the Grand Jury minutes, at least in camera, so as to afford the defendants their constitutional rights.

In view of the foregoing it is respectfully urged that the within motion to reargue be granted, and that on reargument, the Court vacate and set its decision aside and grant the original motion of the defendants to inspect the Grand Jury minutes and to dismiss the indictment, if so warranted. ."

Affirmed under penalty of

perjury this 2nd day of May, 1973.


Morris J. Ezra

MEMORANDUM DECISION DATED MAY 23, 1973, DENYING
MOTION TO REARGUE (LUNDBERG, J.)

Motion to reargue denied. Neither the Criminal Procedure Law nor Matter of Miranda v. Isseks, 41 App. Div. 2d 170, prevent the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. and the prior judicial determination by Judge Gates.

PIERRE G. LUNDBERG
C.J.

A 022

RECEIVED 1977

At a Term of the Appellate Division of the Supreme Court
of the State of New York, Second Judicial Department,
held in Kings County on February 15, 1977

HON. CHARLES MARCETT, Acting Presiding Justice
HON. JOSEPH F. HAWKINS,
HON. JOSEPH A. SUOZZI,
HON. MILTON MOLLEN,

Associate Justices

The People of the State of New York,

Respondent,

Overstock Book Company, Inc., a/k/a
Timely Books, a/k/a Beautiful Books,
and Robert Brown,

Appellants

Order on Appeal from
Judgments of Conviction

In the above entitled action, the above named Overstock Book Company, Inc.,
a/k/a Timely Books, a/k/a Beautiful Books, and Robert Brown,

defendant/s in this action, having appealed to this court from ~~judgments~~ two judgments of
the County Court, Suffolk County ~~rendered~~ one rendered March 19, 1976 as to
defendant Overstock Book Company, Inc., and the other rendered April
2, 1976 as to defendant Robert Brown;

and the said appeal having been submitted by Joel Pirschhorn,
Esq., of counsel for the appellant, and submitted by Steven A. Hovani, Esq.,

of counsel for the respondent, and due deliberation having been had thereon, and upon this court's
decision slip heretofore filed and made a part hereof, it is

ORDERED that the ~~judgments~~ two judgments appealed from
are hereby unanimously affirmed; and it is further

ORDERED that this case is remitted to the County Court, Suffolk
County, for further proceedings pursuant to CPL 460.50 (subd. 5).

Enter

Clerk of the Appellate Division

A 023

A D 2d

S - January 18, 1977

96 E
97 E

The People, etc., respondent,
v. Overstock Book Company, Inc.,
a/k/a Timely Books, a/k/a
Beautiful Books, and Robert Brown,
appellants.

Belli, Sarisohn, Creditor, Garner, Thierman & Steindler,
Commack, N.Y. (Hirschhorn and Freeman [Joel Hirschhorn]
of counsel), for appellants.

Henry F. O'Brien, District Attorney, Riverhead, N.Y.
(Steven A. Hovani of counsel), for respondent.

Two judgments of the County Court, Suffolk County, one
rendered March 19, 1976 as to defendant Overstock Book
Company, Inc., and the other rendered April 2, 1976 as to
defendant Robert Brown, affirmed. No opinion.

This case is remitted to the County Court, Suffolk County,
for further proceedings pursuant to CPL 460.50 (subd. 5).

MARCELT, Acting P.J., HAWKINS, SJOZZI and MOLLEN, J.J.,
concur.

February 15, 1977

PEOPLE v. OVERSTOCK BOOK
COMPANY96 E
97 E

State of New York

Court of Appeals

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK
Respondent,

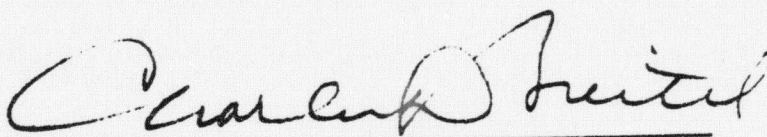
CERTIFICATE
DENYING
LEAVE

against
OVERSTOCK BOOK COMPANY, INC., a/k/a
TIMELY BOOKS, a/k/a BEAUTIFUL BOOKS
and ROBERT BROWN,
Defendants-Appellants.

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York

April 6, 19 77



Chief Judge

Mark M. Baker, Esq.
Rhodes, Baker & Fisher
16 Court Street
Brooklyn, New York 11241

Belli, Sarisohn, Creditor,
Carner, Thierman & Steindler
1020 East Jericho Turnpike
Commack, New York 11725

Hon. Henry F. O'Brien
District Attorney, Suffolk Co.
Riverhead, New York

Clerk, Court of Appeals

*Description of Order:

A 025

2-15-77 App Div 2d affmd. 4-2-76 Co. Ct. Suffolk Co. Brown's conv.
and 3-19-76 Co. Ct., Suffolk Co. Overstock's conv.

COUNTY COURT : SUFFOLK COUNTY

-----x
THE PEOPLE OF THE STATE OF NEW YORK

- against -

BARRY BROWN, ROBERT BROWN, OVERSTOCK
BOOK COMPANY, and BANCO PANAS,

Defendants.

APRIL, 1972,

GRAND JURY.

-----x
Riverhead, N.Y.,
April 27, 1972.

GRAND JURY MINUTES

Indictment No. 555-72

Official Stenographer
Jeannine Menichino

A 026

COUNTY COURT : SUFFOLK COUNTY

----- x
THE PEOPLE OF THE STATE OF NEW YORK

- against -

BARRY BROWN, ROBERT BROWN, OVERSTOCK
BOOK COMPANY, and BANO PANAS,

Defendants.

APRIL, 1972,

GRAND JURY.

----- x
Riverhead, N.Y.,
April 27, 1972.

APPEARANCES: HON. GEORGE J. ASPLAND, District Attorney
of Suffolk County; by IRA SIMON, Esq.,
Assistant District Attorney, of counsel,
for the People.

MR. SIMON: At this time I will of course charge you as to the allegations which are of course on the basis of the evidence that has been presented to the Grand Jury here. We allege four crimes have been committed. They are Conspiracy in the fourth degree and I'll define that, Conspiracy in the third degree, Obscenity in the first degree and Obscenity in the second degree. Now, those are the four crimes. We allege some two hundred and seven different acts which comprise these four crimes and I'll be more specific. Now, we allege one act of Conspiracy in the fourth degree which is contained in section 105.00 of the Penal Law and that reads as follows: A person is guilty of Conspiracy in the fourth degree when with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct. And of course we allege conspiracy to be between and amongst as with all the counts of the indictment, the Overstock Book Company, also known as Timely

Books and Beautiful Books, Bano Panas, also known as Gus, Barry Brown and Robert Brown. Now, there is another pertinent section and that is in order to find that a person has committed Conspiracy or in order to convict a person of Conspiracy an overt act must be alleged and proved to have been committed by one of the conspirators in furtherance of the conspiracy and of course the evidence that has been presented before you I'm sure indicates a number of overt acts performed by every one of these individuals concerned here. Now, in this regard I would also charge that an act by one of the conspirators in furtherance of the conspiracy is chargeable to all of the conspirators. Now, we allege that this conspiracy in the third degree took place in the County of Suffolk of course between in and about January of 1971 to in and about---with- drawn, I was speaking about conspiracy in the fourth degree, we allege that conspiracy in the fourth degree took place in the County of Suffolk in and about June of 1971 to in and

about April of 1972, and that, gentlemen, is, as you remember the evidence, the period covered by all the business that was made in this case and the execution of the search warrant and seizure. Now, we allege further one count of conspiracy in the third degree and that is defined in section 105.05 of the Penal Law, and is defined as follows: A person is guilty of conspiracy in the third degree when with intent that conduct constituting a felony be performed, he agrees with one or more persons to engage in or cause the performance of such conduct. Now, the felony that we are alleging here of course, gentlemen, is the wholesale promoting of obscene books and there will be a number of charges relating to that obscenity in the first degree and the allegations are that these individuals conspired to and agreed with each other to commit the crime of obscenity in the first degree and the period of time that is alleged in regard to that is between in and about January of 1971 to in and about March of 1972 and that, as you remember the evidence,

gentlemen, is the period covered basically by the invoices that show sales from January to about March and also by the testimony that indicated one large wholesale buy sometime in January of 1972; and again I remind you that this same thing goes for conspiracy third as conspiracy fourth, it must be alleged and proved, an overt act must be proved to have been committed by one of the conspirators in furtherance of the conspiracy. Now, we allege, gentlemen, some one hundred and twenty three acts of obscenity in the first degree and obscenity in the first degree is defined in section 235.05 of the Penal Law as follows insofar as it relates to this presentation: "A person is guilty of---", that section is 235.06 for obscenity in the first degree: A person is guilty of obscenity in the first degree when, knowing its contents and character, he wholesale promotes or possesses with intent to wholesale promote, any obscene material; and of course this is a class D felony, and pursuant to that, gentlemen, I also charge that whole pro-

6.
mote is defined in section 235 of the Penal Law, subdivision 5: Wholesale promote means to manufacture, issue, sell, provide, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate or to offer or agree to do the same for purposes of resale; and also in conjunction with this, there are certain presumptions of the Penal Law with regard to obscenity in the first degree and obscenity in the second degree and they are found in section 235.10 of the Penal Law, subdivision 1: A person who promotes or wholesale promotes obscene material or possesses the same with intent to promote or wholesale promote it, in the course of his business is presumed to do so with knowledge of its contents or character. Subdivision 2: A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same. Now, with regard to obscenity in the first degree and the one hundred and twenty three allegations of acts of obscenity in the first degree, the

evidence of course, gentlemen, was the purchase that was made by Mr. Eroria for, specifically for purposes of reselling the magazines. Of course I'm sure you remember the testimony and there are a hundred and twenty three individual magazines and each magazine is alleged was sold knowing that it was going to be resold. Now, there are some eighty two allegations or charges of obscenity in the second degree and that is defined by section 235.05 of the Penal Law as follows: A person is guilty of obscenity in the second degree when knowing its contents and character, he promotes or possesses with intent to promote any obscene material. And that is a class A misdemeanor. Now, obscene is defined in section 235.00 of the Penal Law as follows: "Obscene". Any material or performance is obscene if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such mat-

ters and (c) it is utterly without redeeming social values." And furthermore, "Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience." Now, material is defined in 235.00 subdivision 2 as follows: Material means anything tangible which is capable of being used or adapted to arouse interest, whether through reading, observation, sound or in any other manner. Now, promote is defined in section 235 subdivision 4 of the Penal Law: Promote means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same. I think we have covered the basics. All in all there is an allegation of some two hundred and seven criminal acts here, one conspiracy in the fourth degree, one conspiracy in the third degree, a hundred and twenty three

obscenity in the first degree and eighty two obscenity in the second degree and the evidence relating, as you I'm sure remember, the obscenity in the second degree are the purchases made, the mail order and also each title of magazines that was seized pursuant to the search warrant. Each title and that presumption of six or more would relate to that because, as you remember, six titles except for one in which five were seized. Of course you can use certain substantial evidence or anything like that to determine whether or not they were possessed with intent to promote. Now, I think I read promotes or possesses with intent to promote which is obscenity in the second degree.

*

I, Jeannine Menichino, do hereby certify that the foregoing 9 pages are a true and accurate transcript of the Grand Jury proceedings held before the Suffolk County Grand Jury in the aforesaid matter on April 27th, 1972, in Riverhead, New York.
Dated Oct. 20, 1975.

Jeannine Menichino
Grand Jury Stenographer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

ROBERT BROWN,

DOCKET NO. 77 C 1081

Petitioner,

- against -

MEMORANDUM AND ORDER

MELVYN TANENBAUM, et al.,

Respondents.

- - - - - x

PRATT, J:

By habeas corpus, 28 USC §2254, petitioner seeks relief from a judgment entered April 2, 1976 in the County Court of the State of New York, Suffolk County, convicting him, upon his plea of guilty, of the crimes of obscenity in the first and second degrees, and sentencing him to serve concurrent terms of imprisonment of three years and of sixty days, respectively. His conviction was affirmed without opinion by the Appellate Division, Second Department, on February 13, 1977. On April 6, 1977 leave to appeal to the New York Court of Appeals was denied by Chief Judge Breitel.

For the reasons set forth below, petitioner's request for habeas corpus relief is denied and the petition is dismissed.

I.

On April 28, 1972 a Suffolk County grand jury returned an indictment charging the petitioner and others, in 207 counts, with the crimes of conspiracy in the third and fourth degrees and obscenity in the first and second degrees. On November 29, 1972, petitioner's counsel made an omnibus motion seeking, inter alia, inspection of the grand jury minutes and dismissal of the indictment on the grounds that the evidence before the grand jury was not legally sufficient to sustain the indictment. In its decision denying this motion, the court noted:

The titles [of the magazines] included in this multi-count indictment are the same titles included in the search warrant issued by this Court on March 22, 1972 (Hon. F.L. Gates). After scrutinizing each of said publications, Judge Gates made a preliminary determination that each of said publications is obscene before issuing the warrant. * * * This resolves in my mind the question -- whether the titles included in counts 2-207, inclusive, are obscene pursuant to Penal Law §235.00. The Grand Jury may find on the basis of the material itself that it contains all the statutory elements of being obscene including but not limited to the lack of redeeming social value.

People v. Overstock Book Co., Inc.
No. 555/72, Mem. at 2 (Suffolk County
Ct Mar. 8, 1973).

Thereafter, petitioner again moved to dismiss the indictment on the grounds, inter alia, that the material was not obscene as a matter of law and that the obscenity statutes were unconstitutional. This motion was summarily denied on

May 8, 1973. By motion dated May 2, 1973, petitioner sought reargument of the November 29, 1972 motion to inspect the grand jury minutes and to dismiss for legal insufficiency. In its decision denying the motion to reargue, the court concluded:

Neither the Criminal Procedure Law nor Matter of Miranda v. Isseks, 41 App. Div. 2d 186, prevent [sic] the defendants from entering pleas of guilty and thereafter appealing this Court's prior determination based on the language of the C.P.L. and the prior judicial determination by Judge Gates.

People v. Overstock Book Co., Inc.
No. 555-72, Mem. (Suffolk County Ct.
May 23, 1973) (emphasis in original).

Finally, "after intensive consultation with his counsel", Petition ¶15, petitioner entered pleas of guilty to two counts -- one charging a felony, one a misdemeanor -- in full satisfaction of the 207 count indictment.

II.

In support of his application for habeas corpus relief, petitioner contends (1) that the controlling statute under which he was convicted, New York Penal Law §235.00(1), which was repealed by Laws of 1974, Ch. 989, was constitutionally invalid and, (2) that as a matter of law the materials underlying his convictions were not obscene. Recognizing, however, that one who enters a counseled, voluntary guilty plea generally "may not thereafter raise independent claims relating to the deprivation of constitu-

tional rights that occurred prior to the entry of the guilty plea", Tollett v. Henderson, 411 US 256, 267 (1973), petitioner first seeks to show that his two contentions on the merits are properly cognizable in this habeas corpus proceeding.

III.

A federal court in a habeas corpus proceeding may not take cognizance of petitioner's contention that as a matter of law the materials underlying his conviction were not obscene if his counseled guilty plea constitutes a waiver of this issue. See Menna v. New York, 423 US 61 (1975); Tollett v. Henderson, *supra*. A widely recognized exception to the waiver rule of Menna and Tollett is that a plea entered upon a clear understanding that it will not foreclose further judicial review of specifically reserved issues of law will not operate as a bar to such further review. See Lefkowitz v. Newsome, 420 US 283 (1975); United States v. Zudick, 523 F2d 848 (CA3 1975); United States v. Mann, 451 F2d 346 (CA2 1971).

Petitioner claims that the exception to the waiver rule applies here. He points to the Suffolk County Court's language in denying his motion to reargue on May 23, 1973 and maintains that this statement quoted *supra* had put all parties on notice that the issue of the sufficiency of the ground jury evidence, and, hence of the obscenity vel non of the magazines in question, would be preserved for review even

in the face of the entry of a guilty plea. According to petitioner, "what is in issue is whether his [the court's] unambiguous statement plausibly gave rise to an expectation by all concerned that the question of the sufficiency of the evidence would survive a plea of guilty. Cf. Lefkowitz v. Newsome, 420 US 283, 290 (1975)." Reply Brief for Petitioner at 5-6.

IV.

Petitioner's reliance on this May 23, 1973 statement as evidence of a conditional guilty plea is without merit. First, the court's May 23 decision must be read in the context in which it was made. In the affidavit supporting petitioner's motion to reargue, counsel had urged in connection with the inspection of the grand jury minutes that a guilty verdict after trial would preclude an appeal based on the legal insufficiency of the evidence presented to the grand jury. It was in response to this argument that the court correctly stated that such an appeal was precluded by neither the Criminal Procedure Law nor by the cited case, the correct law being that a properly framed guilty plea could be entered which preserved the reviewability of the obscenity vel non of the magazines on appeal. What the court did was to suggest a guilty plea as a solution to counsel's point that a trial would preclude his objection to the grand jury's action. The court did not attempt to sug-

gest the manner in which such a guilty plea should be entered.

Second, it is reasonable to assume that, should the petitioner take the suggested solution, the court envisioned a clearly conditional plea expressly reserving these issues for appellate review. See Lefkowitz v. Newsome, supra. In the instant case, however, the guilty plea actually entered was painstakingly unequivocal and unconditional. See Petition, Ex. F.

As explained by the Supreme Court in Lefkowitz v. Newsome, supra:

Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained.

New York, however, has chosen not to treat a guilty plea as * * * a "break in the chain of events" with regard to certain claims raised in pre-trial proceedings * * *. The guilty plea operates simply as a procedure by which the constitutional issues can be litigated without the necessity of going through the time and effort of conducting a trial, the result of which is foreordained if the constitutional claim is invalid. The plea is entered with the clear understanding and expectation by the State, the defendant, and the Courts that it will not foreclose judicial review of the merits of the alleged constitutional violations.

420 US at 289-90.

There was no such "clear understanding and expectation" among the prosecutor, the judge, and the petitioner here.

Neither the trial judge, the judges of the New York Appellate Division, nor one judge of the New York Court of Appeals could find such a clear understanding and expectation of a conditional plea; the prosecutor, an alleged party to the agreement, denies its existence; and the record of the plea proceedings is completely barren of any mention of a clear, express, conditional plea which reserved review of the obscenity vel non of the magazines for this or any other court.

V.

Petitioner also contends that the statute under which he was convicted was constitutionally invalid. Unlike the issue of the obscenity vel non of the magazines, such a contention is directly reviewable in this federal habeas corpus proceeding. However, like petitioner's attempt to raise the issue of the obscenity vel non of the magazines, his contention is without merit.

When the indictment was returned in 1972, New York's controlling obscenity statute, admittedly consistent with the then prevailing obscenity test established in Roth v. United States, 354 US 476 (1957), and Memoirs v. Massachusetts, 383 US 413 (1966), provided:

Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism and (b) it goes substantially beyond customary

limits of candor in describing or representing such matters and (c) it is utterly without redeeming social value.

NY Penal Law §235.00(1), repealed,
Laws of 1974, Ch. 989.

On June 21, 1973, however, the Supreme Court decided Miller v. California, 413 US 15 (1973), which vacated a conviction obtained under a California obscenity statute similar to New York's, and rejected the Roth-Memoirs test. The Court held that the test for obscenity would thereafter be:

(a) whether the "average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest * * *,
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.
Id. at 24.

Two days after the Miller decision, the Supreme Court vacated a judgment obtained under NY Penal Law §235.00 and remanded the case to the New York Court of Appeals for reconsideration in light of Miller. On remand, the New York court construed its statute as being limited to "offensive depictions of ultimate sexual acts, masturbation, excretory functions, lewd genital exhibition, i.e. . . .ly that sort of thing described in the Miller opinion . . . * * *." People v. Heller, 33 NY2d 314, 328 (1973). In short, the court of appeals held that the then existing statute "more than complied with the Miller limits as written and construed." Id. at 331.

Petitioner argues that the statute under which he was convicted was unconstitutional because it did not meet the specificity requirements announced in Miller, and that the subsequent judicial construction offered in Heller, published after the commission of the acts charged in the indictment, cannot be retroactively applied to avoid its constitutional deficiency. But the New York Court of Appeals did not legislate. All it did in Heller was review the long line of pre-Miller cases construing §235.00 and determine that the statute had never been construed with less specificity than Miller required. Since the statute had always complied with the Miller specificity standards, §235.00 gave constitutionally fair notice of the conduct proscribed and, as applied to petitioner, did not unexpectedly make criminal that which was not previously thought to be criminal. See Ward v. Illinois, 45 USLW 4623 (1977); United States v. Hamling, 418 US 87 (1974).

Pre-Miller construction of §235.00 afforded defendant adequate notice that his conduct was proscribed, compare, e.g., Petitioner's Exhibit "Young Boys and Oral Sex" with materials held to be obscene in People v. G.I. Distributors, Inc., 20 NY2d 104 (1967), and one federal court has already found tenable Heller's holding that §235.00 as construed always embodied the constitutionally sufficient definition of obscenity. See DeSalvo v. Codd, 386 F Supp 1293, 1300

(SDNY 1974) (3-judge court). Thus, the interpretation given to \$235.00 in Heller provided the same "clarifying gloss" found acceptable in Hamling v. United States, supra, and, petitioner's assertion to the contrary notwithstanding, did not constitute an unconstitutional ex post facto application.

VI.

Accordingly, petitioner's request for federal habeas corpus relief is denied and the petition is dismissed. The stay of execution of petitioner's sentence ordered by the undersigned will, therefore, be vacated 10 days after the filing of this memorandum and order. Certificate of Probable Cause is issued.

SO ORDERED.

Dated: Westbury, New York
October 19, 1977.



GEORGE C. PRATT
U. S. DISTRICT JUDGE

RHODES

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 22 day of Nov. 1977 deponent served the within Appendix upon

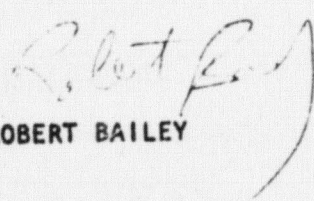
Hon. Henry F. O'Brien, D.A., Suffolk Co.

attorney(s) for
Appellee

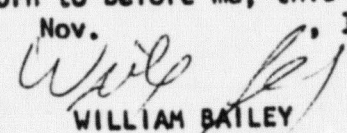
In this action, at

Criminal Courts, Bldg., Center Drive So., Riverhead, NY 11901

the address(es) designated by said attorney(s) for that purpose by depositing
1 copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 22 day
of Nov., 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978